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Supreme Court of the United States

OCTOBER TERM, 1940

NO. 977

ARTHUR V. MITCHELL,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
FRANK O. LOWDEN, ET AL.,
Appellees.

On Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

BRIEF FOR THE STATES AND COMMONWEALTHS OF ARKANSAS, ALABAMA, FLORIDA, GEORGIA, KENTUCKY, LOUISIANA, MISSISSIPPI, TENNESSEE, TEXAS AND VIRGINIA, AMICI CURIAE.

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Supreme Court of the United States

OCTOBER TERM, 1940

NO. 577

ARTHUR W. MITCHELL,
Appellant,

Vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, FRANK O. LOWDEN, ET AL.,
Appellees.

On Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

BRIEF FOR AMICI CURIAE

This brief is filed in accordance with permission granted to the amici curiae by this Honorable Court on March 21, 1941.

STATEMENT

The appellant filed a complaint (R. 3-7) before the Interstate Commerce Commission, alleging that the appellees, Frank O. Lowden, James E. Gorman and Joseph B. Fleming, trustees of the estate of the

Chicago, Rock Island & Pacific Railway Company, a corporation (hereinafter called the Rock Island), Illinois Central Railway Company, a corporation, and Pullman Company, a corporation, had subjected him to unjust discrimination and undue and unreasonable prejudice, and praying an order to require them in the future to cease and desist from violations of the Interstate Commerce Act, and to provide for colored persons holding tickets for first-class accommodations from Chicago, Illinois, to Hot Springs, Arkansas, such first-class services and facilities as they provide for white persons holding tickets for first-class accommodations from Chicago, Illinois, to Hot Springs, Arkansas, and such other and further order or orders as the Commission might consider proper in the premises (R. 7).

The complaint was set for hearing by the Interstate Commerce Commission before an examiner, at which hearing testimony was taken (R. 66-213). Thereafter, the examiner made his proposed report to the Commission (R. 10-17), to which the complainant filed exceptions (R. 259-279), in answer to which the defendant, Rock Island, filed a reply (R. 214-219). The cause then came before the full Commission for oral argument (R. 18), and the Commission filed its report (R. 18-33) and order thereon dismissing the complaint (R. 34). The complainant then filed a petition for rehearing and reargument, and the defendant, Rock Island, filed its reply thereto (R. 34), and the Commission entered its order denying said petition for rehearing and reargument (R. 34-35). Appellant then filed a

petition in the United States District Court for the Northern District of Illinois, Eastern Division (R. 1-40), praying that the order of the Interstate Commerce Commission be set aside, annulled, and vacated, as null and void; that a decree be entered granting to the plaintiff the relief prayed for in his complaint filed before the Interstate Commerce Commission; and for any and all other and further relief that to the Court seemed meet and just (R. 40). At a hearing before a three-judge court, evidence was taken and oral arguments were heard (R. 220-258). Thereafter, the Court made findings of fact and conclusions of law (R. 52-53), and entered a decree dismissing the complaint for lack of jurisdiction (R. 53), whereupon, the appellant was allowed an appeal to this Court (R. 61-62), and this Court noted probable jurisdiction on December 16, 1940.

The gist of the appellant's complaint before the Interstate Commerce Commission was that while he was traveling from Chicago, Illinois, to Hot Springs, Arkansas, April 20-21, 1937, on a first-class ticket, and on the morning of April 21, 1937, after the train on which he was then riding, a train of the Rock Island, had entered the State of Arkansas he was compelled by the conductor of the train, an employee of the Rock Island, to move from the seat which he was occupying in the Pullman car, and for which he offered to pay the established fare, to a second-class coach, of accommodations inferior to the first-class accommodations on the train, the action of the conductor having been taken pursuant to the practice of the Rock Island, claiming to act

under the Separate Coach Law of the State of Arkansas. Pope's Digest, Chapter XX, Sections 1190-1201.

INTEREST OF AMICI CURIAE

The amici curiae have no particular interest in whether or not the judgment appealed from is affirmed or reversed. We have no particular interest in whether or not the order of the Interstate Commerce Commission dismissing the appellant's complaint is set aside or allowed to stand. However, we are interested in seeing that the issues before the Court in this case are clarified, rather than confused. Specifically, we are interested in seeing that this case is disposed of without a consideration of the question of whether or not the Separate Coach Law of the State of Arkansas is applicable to interstate, as well as intrastate, passengers, and without a consideration of the question of whether or not said law, if applicable to both interstate and intrastate passengers, is unconstitutional as an unauthorized interference with, and burden upon, interstate commerce. We believe that these questions are not properly before the Court for consideration and determination in this cause, and will hereinafter give our reasons for this belief. Further, we desire to express our views of the law in regard to these questions, should this Court hold that they are properly before it for consideration and determination in this case. It is a matter of common knowledge that the States and Commonwealths of Alabama, Florida, Georgia, Kentucky, Louisiana, Mis-

sissippi, Tennessee, Texas and Virginia have segregation statutes similar to the Separate Coach Law of the State of Arkansas which would probably be affected by any decision which this Court might make in regard to either of the questions hereinabove stated.

Code of Alabama, 1923, Sections 9968-9969;
Chapter 3743, Sections 1 and 2, Laws of Floriday, 1887, and
Chapter 5893, Sections 1 and 3, Laws of Florida, 1909;
Code of Georgia, 1933, Sections 18-205--18-210;
Kentucky Statutes, Sections 795-798;
Dart's Louisiana General Statutes, Sections 8130-8132;
Code of Mississippi, 1930, Section 6132;
Williams' Code of Tennessee, 1934, Sections 5518-5520;
Texas Penal Code, as amended, Articles 1659-1660;
Michie's Code of Virginia, 1936, Sections 3962-3969.

We heartily agree with the following statement made by Mr. Hughes, of counsel for the Rock Island, at the hearing before the three-judge Court:

"Most cases involving this delicate subject of segregation go through the state courts in which the states interested themselves are heard.

"If this plaintiff thought the Arkansas statute was an infringement upon the 14th Amendment he might have proceeded in a court to enjoin its enforcement and there might have had a determination of his right under that amendment. He might have, if he thought that the state law of Arkansas requiring equal accommodations was being violated by the Rock Island or any other railroad, tested the question in an Arkansas State Court. The State Court of Arkansas has the determination as to what constitutes equal or unequal accommodations within the meaning of the Arkansas statute." (R. 250)

It is a matter of common knowledge, of which this Court takes judicial notice, that in the States and Commonwealths which are parties to this brief there reside large numbers of the members of both the white and colored races. These statutes, we respectfully submit, were enacted by the legislatures of these various States and Commonwealths, not for the purpose of discriminating against, harassing, oppressing, or imposing a burden upon the members of either race, but rather, for the benefit and protection of the members of both races. That this is so, and that these statutes were enacted because of an important occasion for the reasonable exercise of the police power which these States and Commonwealths possess, to accomplish this end, is supported by the language of Mr. Justice Brown, speaking for this Court, in the case of *Plessy v. Ferguson*, 163 U. S. 537, where such a statute was be-

fore the Court for consideration. We here quote from his opinion in that case as follows:

> "A statute which implies merely a legal distinction between the white and colored races —a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude.
>
> * * * * *
>
> "The object of the amendment (Fourteenth) was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power

even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.

* * * * *

"It is also suggested by the learned counsel for the plaintiff in error that the same argument that will justify the state legislature in requiring railways to provide separate accommodations for the two races will also authorize them to require separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men's houses to be painted white, and colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color. The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion for the public good, and not for the annoyance or oppression of a particular class.

* * * * *

"In determining the question of reasonableness it (the legislature) is at liberty to act with reference to the established usages, customs and traditions of the people, and with a

view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.

"We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms

of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. As was said by the Court of Appeals of New York in *People v. Gallagher*, 93 N. Y. 438, 448, 'this end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized and performed all of the functions respecting social advantages with which it is endowed.' Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."

The foregoing language was used by this Court in 1896, in speaking of the conditions existing in the State of Louisiana at that time. However, we submit that it is as true of the conditions existing today in the States and Commonwealths which are parties to this brief as it was of conditions in Louisiana at the time it was used.

THE REVIEW OF AN ORDER OF THE INTERSTATE COMMERCE COMMISSION BY THE JUDICIARY IS LIMITED.

While the order of the Interstate Commerce Commission under attack in this case is negative in form, since it is an order dismissing the complaint and refusing to issue the cease and desist order prayed for, yet this fact is immaterial as to the power of the judiciary to review the same. *Rochester Telephone Corporation v. United States*, 307 U. S. 125.

However, the review of an order of the Interstate Commerce Commission by the judiciary is strictly limited. Mr. Justice Frankfurter spoke to this question for the Court in the case of *Rochester Telephone Corporation v. United States*, supra, as follows:

> "From these general considerations the Court evolved two specific doctrines limiting judicial review of orders of the Interstate Commerce Commission. One is the primary jurisdiction doctrine, firmly established in *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426. Thereby matters which call for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked. The other is the doctrine of administrative finality. Even when resort to courts can be had to review a Commission's order, the range of issues open

to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable. *Interstate Commerce Comm'n v. Illinois Central R. Co.*, 215 U. S. 452, 470; *Interstate Commerce Comm'n v. Union Pacific R. Co.*, 222 U. S. 541."

The Interstate Commerce Commission, in its report, speaking of the Separate Coach Law of the State of Arkansas, stated: "It is not for us to construe the statute," (R. 28) and "It is not for us to enforce the State law. We understand that to be a matter for State authorities." (R. 29)

Consequently, it is submitted that, under the doctrine of limited judicial review of orders of the Interstate Commerce Commission, the question of the construction of the Separate Coach Law of the State of Arkansas as to its applicability to interstate passengers, and the question of its constitutionality, if so applicable, are not before the Court for consideration and determination in this cause.

THE FEDERAL COURTS WILL NOT ENTER A SENSITIVE AREA OF SOCIAL POLICY UNLESS NO ALTERNATIVE TO ITS ADJUDICATION IS OPEN.

We take it that it is elementary that the question of segregation of the races "touches a sensitive area of social policy."

In the very recent case of *Railroad Commission of Texas, Lon A. Smith, Ernest O. Thompson, et al., v. The Pullman Company, Guy A. Thompson, Trustee, The St. Louis, Brownsville & Mexico Railway Company, Debtor, et al.*, 61 Sup. Ct., Advance Sheet No. 10, page 643, 85 L. Ed., Advance Sheet No. 9, page 580, such a question was before the Supreme Court. The proposition before the Court was the validity of an order of the Texas Railroad Commission which provided:

> "No sleeping car shall be operated on any line of railroad in the State of Texas * * * unless such cars are continuously in the charge of an employee * * * having the rank and position of Pullman conductor."

The Pullman porters, who were allowed to intervene in the cause, attacked the validity of the order mainly upon the ground that it was a discrimination against negroes in violation of the Fourteenth Amendment. Mr. Justice Frankfurter, after pointing out that it was well known that porters on Pullmans are colored and conductors are white, spoke for the Court as follows, in declining to consider the constitutional question raised by the Pullman porters:

> "The complaint of the Pullman porters undoubtedly tendered a substantial constitutional issue. It is more than substantial. It touches a sensitive area of social policy upon

which the federal courts ought not to enter unless no alternative to its adjudication is open. Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy. It is therefore our duty to turn to a consideration of questions under Texas law."

The opinion then pointed out ways, under Texas law, by which a definitive ruling on the statutory power of the Texas Railroad Commission to make the order under attack could be had in the Texas courts; and concluded that, until such a definitive ruling was obtained, which definitive ruling might keep the constitutional issue from arising, it would not be considered and decided by the Court.

We submit that the identical situation is here presented. This proceeding can be disposed of, and, we respectfully submit, should be disposed of, by a determination of the following questions only:

1. Did the Interstate Commerce Commission, in making the order here under attack, exceed its constitutional power?

2. Did the Interstate Commerce Commission, in making the order here under attack, exceed its statutory authority?

3. Was there evidence before the Interstate Commerce Commission to sustain its order?

Likewise, if a definitive ruling on the question of whether or not the Separate Coach Law of the State of Arkansas is applicable to interstate, as well as intrastate, passengers is desired, there is no question but that the law of the State of Arkansas furnishes easy and ample means for securing the same.

Such a definitive ruling might keep the question of the constitutionality of the Separate Coach Law of Arkansas, if applied to interstate passengers, from arising. Consequently, it is earnestly submitted that the question of the applicability of the Separate Coach Law of the State of Arkansas to interstate passengers, and the question of the constitutionality of said law, if so applicable, should not be considered by this Court in this cause.

THE QUESTIONS OF THE APPLICABILITY OF THE SEPARATE COACH LAW OF THE STATE OF ARKANSAS TO INTERSTATE PASSENGERS, AND OF ITS CONSTITUTIONALITY, IF APPLIED TO INTERSTATE PASSENGERS, ARE NOT PROPERLY BEFORE THE COURT FOR CONSIDERATION AND DETERMINATION IN THIS CASE.

The complaint filed before the Interstate Commerce Commission did not raise either of these questions. The only references in the complaint to the Separate Coach Law of the State of Arkansas are the following:

"That the defendants, claiming to act under authority of the Arkansas Statute (Kirby's Arkansas Statute, Sections 6622 to 6632), did force and compel this complainant to ride in a second class car, notwithstanding the fact that complainant held a first class ticket;

* * * * *

"and said practice of the defendants in furnishing such unequal accommodations to persons holding similar first class tickets, under the aforesaid Statute, causes undue and unreasonable advantage and preference to white persons; and causes undue and unreasonable prejudice to this complainant and all other Colored persons who in the future will use, as interstate passengers, the lines of the said defendants." (R. 6)

and

"That the action of the defendants in operating under the Arkansas law causes undue and unreasonable preference to some persons and undue and unreasonable prejudice to complainant and other persons, in violation of Section 13 of the Interstate Commerce Act, and the Fourteenth Amendment of the United States Constitution in denying to petitioner equal protection of the laws." (R. 7)

It is seen that under the allegations of the complaint, itself, the appellant charges that the defen-

dants claimed to act under authority of the Separate Coach Law of the State of Arkansas, and, further, that it is the action and practice of the defendants, in purported compliance with said law, and not the law itself, which, according to the complaint before the Interstate Commerce Commission, allegedly caused undue and unreasonable prejudice to him, in violation of the Interstate Commerce Act and the Fourteenth Amendment of the United States Constitution.

That the questions of the applicability of the Separate Coach Law of the State of Arkansas to interstate passengers, and of its constitutionality, if so applicable, were not considered, even by the appellant, to be questions for consideration and determination is shown by the following statement which the appellant, as counsel for himself, made at the hearing before the examiner of the Interstate Commerce Commission:

> "The question of segregation is not involved. The law of the state of Arkansas, which has been put into the record here, provides that the passengers of the two races must be separated, but that the accommodations must be equal.
>
> "Now, we are contending that a colored man is entitled to everything that a white man gets, who pays a similar fare, on these trains." (R. 156)

Indeed, the Separate Coach Law of the State of Arkansas, was introduced in evidence at the hearing before the examiner of the Interstate Commerce Commission by the appellant, himself, apparently for the purpose of showing that he was entitled to equal accommodations under said statute (R. 125-127, 211-213).

That the examiner of the Interstate Commerce Commission considered that the appellant was not questioning the applicability of the Separate Coach Law of the State of Arkansas to interstate passengers, or attacking its constitutionality, if so applicable, in this proceeding, is shown by the following excerpt from his report:

> "For the purposes of this proceeding complainant accepts segregation under the Arkansas statute, but urges that defendants, to remove and avoid unjust discrimination and undue prejudice, are bound to provide the same equipment and accommodations for colored passengers as for white passengers." (R. 16)

It is true that, in his exceptions to the examiner's report, appellant denies that he accepted segregation under the Arkansas statute for the purposes of this proceeding (R. 260-261, 265). However, it is respectfully submitted that the statement hereinabove set out, which appellant made, as counsel for himself before the examiner, and the action of the appellant himself in introducing the Separate Coach

Law of the State of Arkansas in evidence, support the statement of the examiner in his proposed report, and refute the position taken by the appellant in his exceptions thereto.

That the Interstate Commerce Commission did not consider or decide either of these questions, which, indeed, it was without the power or authority to decide, we think is clear when all of the references to the Separate Coach Law of the State of Arkansas in the Commission's report are considered, rather than isolated statements in regard thereto contained therein. At the risk of tedium, we here set out, in the order in which they appear in the Commission's report, all of the references or statements made therein in regard to the Separate Coach Law of the State of Arkansas:

> "Shortly after leaving Memphis and crossing the Mississippi River into Arkansas the train conductor took up the Memphis-Hot Springs portion of his ticket, but refused to accept payment for the Pullman seat from Memphis, and in accordance with custom, compelled him, over his protest and finally under threat of arrest, to move into the car provided for colored passengers, in purported compliance with an Arkansas statute requiring segregation of colored from white persons by the use of cars or partitioned sections thereof providing 'equal, but separate and sufficient accommodations', for both races." (R. 21)

"The use of one of the drawing rooms would have amounted to segregation under the State law and ordinarily such accommodations are available to colored passengers upon demand, the 90-cent seat fare being applicable." (R. 22)

"The statute sets up two distinct groups of passengers, and the question for our determination is whether the circumstances and conditions surrounding these respective kinds of traffic are so substantially different as to justify the difference in treatment here alleged to be unlawful." (R. 25-26)

"At the hearing complainant stated that segregation was not involved and apparently for the purpose of this case he accepted it, regarding the Arkansas statute as requiring it in that State for all passengers, both interstate and intrastate. However, in his exceptions he opposes it as abominable and urges that the statute does not require it as to interstate passengers. The statute is general in its terms in that like the Mississippi and Kentucky statutes dealt with by the Supreme Court, it does not mention either intrastate or interstate passengers. These latter statutes, as already stated, were by State courts confined to intrastate passengers and the Supreme Court accepted those constructions as binding on it. Complainant also relies on the Supreme Court's conclusion in McCabe v. Atchison, T. & S. F. R. Co., supra,

to the effect that the Oklahoma statute had to be construed as applying only intrastate because there had been no construction to the contrary by the State court. Be that as it may, the present case arose out of the apparent assumptions of the parties that the Arkansas statute was applicable to interstate traffic, and while it is not for us to construe the statute, we think, in view of its general terms, that until further informed by judicial determination, defendants are justified, as a matter of self protection, in assuming that it applies to interstate, as well as intrastate, traffic. What we are here dealing with is the practice of the carriers in assumed compliance with the statute, a practice which they could follow even if there were no statute." (R. 27-28)

"It is not for us to enforce the State law. We understand that to be a matter for State authorities. But in deciding the case on the facts presented we must recognize that under the State law defendants must segregate colored passengers." (R. 29)

Attention is particularly called to the statement in the report hereinabove quoted that "what we are here dealing with is the practice of the carriers in assumed compliance with the statute, a practice which they could follow even if there were no statute." It is respectfully submitted that the evidence before the Commission amply supports the Commission's statement that what it was dealing with was

"the practice of the carriers," rather than the Separate Coach Law of the State of Arkansas.

That the carriers might legally follow the practice of segregating the races in the absence of statute has long since been settled by this Court. *Hall v. DeCuir*, 95 U. S. 485; *Chiles v. Chesapeake & Ohio Railway Company*, 218 U. S. 71.

At the hearing before the three-judge district court, appellant also took the view that the question of the applicability of the Separate Coach Law of the State of Arkansas to interstate passengers, and the question of its constitutionality, if so applicable, were not questions for consideration or determination, and the hearing before the Court proceeded on that basis. The appellant, as counsel for himself, stated, in response to a question from the Court as to what relief he asked of the Interstate Commerce Commission:

> "We asked a rule that the railroad be compelled to desist from its practice and to give those things to the colored people that the law of the State of Arkansas provides they shall have.
>
> "I wish the Court would remember that they enforce rigidly that part of the law which provides that they must travel separately. As a group who have to suffer the inconveniences of such a law, we contend that if you are going

to 'Jim Crow' us and put us off, then we are entitled to the benefits of the law that we at least ought to have equal accommodations. There is no question of segregation involved. We have not said to the railroad that it must let us ride together with the white people. I care as little about riding with white people as they care about riding with me, but if I buy first-class passage to ride on the Rock Island or on any other railroad in the United States, under my constitutional rights I am entitled to the same treatment as any man is entitled to regardless of color." (R. 227-228).

Other questions from the Court in regard to this matter, and appellant's answers thereto, were:

"The Court (Judge Woodward): What are the provisions of the statute?

"Mr. Mitchell: What I have recited, that they must travel separately, but that accommodations must be equal.

"The Court (Judge Woodward): Are you invoking the Arkansas statute?

"Mr. Mitchell: I am saying that I was traveling in interstate commerce as a passenger, and that the railroad had no right to discriminate against me because I went into that state. I also stated to the Commission

that the State of Arkansas was violating its own law. They have a law there providing for equal accommodations for negro passengers but they violated that law and they are violating that law. I asked the Commission to enforce that law but they refused to do so." (R. 227-228)

Further excerpts from the proceeding before the three-judge District Court touching on these questions are as follows:

"The Court (Judge Sparks): Do you contend the Arkansas law is not before us, then?

"Mr. Westbrooks: No, not as far as interference with interstate commerce is concerned. That question was brought up and we were therefore compelled to meet it by saying that even the Arkansas law provides for equal accommodations. All of the southern states where they have these separate-car laws, regardless of right or wrong or whether they are valid or invalid, provide for equal accommodations but our contention in this case is that this was an interstate journey and as such the state laws have no application." (R. 232)

"The Court (Judge Sparks): Do you agree that the Arkansas State law has nothing to do with this?

"Mr. Payne: I do not think so.

"The Court (Judge Sparks): They say so, so we will admit that.

"Mr. Payne: This is what the Commission found on that score.

"I would rather call your Honors' attention exactly to what the Commission held.

"Reading from the Commission's decision:

"'* * * Complainant also relies on the Supreme Court's conclusion in McCabe v. Atchison, T. & S. F. R. Co., Supra, to the effect that the Oklahoma statute had to be construed as applying only intrastate because there had been no construction to the contrary by the state court. Be that as it may, the present case arose out of the apparent assumptions of the parties that the Arkansas statute was applicable to interstate traffic, and while it is not for us to construe the statute, we think, in view of its general terms, that until further informed by judicial determination, defendants are justified, as a matter of self-protection, in assuming that it applies to interstate, as well as intrastate, traffic. What we are here dealing with is the practice of the carriers in assumed compliance with the statute, a practice which they could follow even if there were no statute.'" (R. 242)

"Mr. Hughes: It was later, your Honors, when counsel was arguing, that the question arose as to whether the Arkansas statute was in or out. I think he said it was out.

"The Court (Judge Sparks): Mr. Westbrooks said that.

"Mr. Hughes: Yes.

"I am in a state of confusion as to whether it is in or is not." (R. 254)

In spite of the lengthy argument which appellant makes in his brief in regard to the Separate Coach Law of the State of Arkansas, both as to its applicability to interstate passengers, and as to its constitutionality, if so applicable, we respectfully submit that neither of those questions is before this Honorable Court for consideration or determination in this proceeding, for the following reasons:

1. Appellant, as pointed out hereinabove, at the hearing before the examiner of the Interstate Commerce Commission, stated that these questions were not involved, and the hearing before the examiner proceeded on that assumption.

2. This is a review of an order of the Interstate Commerce Commission, and, as pointed out above, the Commission stated in its report in support of its order that is was not for the Commission to construe

the statute, or to enforce it, and that what it was dealing with was not the statute, but the practice of the carriers.

3. As pointed out above, the appellant admitted at the hearing before the three-judge District Court that these questions were not involved, and the Court stated that it would be admitted that the Arkansas State Law had nothing to do with the proceeding.

THE CONGRESS IS THE PROPER FORUM TO WHICH AN APPEAL TO ABOLISH THE THE PRACTICE OF SEGREGATION SHOULD BE MADE, AS APPELLANT HAS RECOGNIZED.

If it is the purpose of the appellant to have the practice of segregation, whether under state law or carrier practice, declared unlawful, his appeal should be made to the National Congress, as it cannot be questioned that Congress, under the commerce clause of the Constitution, has power to make unlawful the segregation of interstate passengers, thereby occupying the field and dispossessing the states of such power as they now exert over the subject.

Indeed, the appellant himself seems to have recognized this fact. On January 5, 1938, Representative Mitchell, the appellant herein, introduced in the House of Representatives a bill, H. R. 8821, to amend the Transportation Act (U. S. C. title 49, sec. 3(1)) by adding the following:

"It shall be unlawful to segregate any persons traveling as interstate passengers on any carrier subject to the provisions of this Act, or in railroad stations, waiting rooms, rest rooms, lunch rooms, restaurants, dining cars, or in any other accommodations provided for passengers traveling interstate, on account of such passengers' race, color, or religion; and any such discrimination or attempted discrimination shall subject the offending carrier, its officers, agents, servants, and employes, to the penalties hereinafter provided for violations of this Act."

The bill was referred to the Committee on Interstate and Foreign commerce. It was never reported out.

On January 3, 1939, the Representative reintroduced the bill, H. R. 182, which was referred to the same committee. It was never reported out, although during the subsequent period the committee was engaged in studying and developing extensive revisions of the Interstate Commerce Act which were finally enacted and approved September 18, 1940, as the Transportation Act of 1940.

On January 3, 1941, the Representative introduced the same bill in the House of Representatives, and again it was referred to the Committee on Interstate and Foreign commerce. H. R. 112, 77th Congress, 1st Session.

The subject, therefore, is now before the Congress for disposition. Perhaps the complainant thus has his proposal of a national legislative policy before the proper forum, wherein the elected representatives from forty-eight States may determine whether the sovereignty exercised over the subject by approximately a quarter of the States is to be overruled by Federal action.

It is significant that, despite many years of agitation and repeated court decisions sustaining State policies of segregation, the Congress has not seen fit to enact legislation bearing directly on this controversial subject. Since this subject has been continuously before the National Congress for more than three years, and is still before that body, and it, the legislative arm of our Government, has not seen fit to enact legislation making the practice of segregation unlawful, we do not believe that the appellant may now be heard on this subject by this Court, the judicial arm of our Government, in a proceeding such as this.

We repeat our contention, and urge its consideration by this Honorable Court, that the question of the applicability of the Separate Coach Law of the State of Arkansas to interstate passengers, and the question of its constitutionality, if so applicable, are not presented for consideration and determination in this cause. However, we submit the following discussion, which we ask to be considered, should this Court decide that these questions are before it for consideration and determination in this proceeding.

STATE SEGREGATION STATUTES DO NOT VIOLATE THE FOURTEENTH AMENDMENT.

That state segregation statutes do not violate the Fourteenth Amendment to the Constitution of the United States has been long since decided by this Court. *Plessy v. Ferguson*, supra.

This view has likewise been almost universally held by the lower Federal Courts and the State Courts, as evidenced by the numerous decisions of those Courts cited in the case of *Gong Lum v. Rice*, 275 U. S. 78.

In this connection, it is interesting to note the inconsistent positions in regard to the Fourteenth Amendment taken by the Solicitor General in his memorandum setting forth his reasons for declining to support the judgment of the three-judge District Court.

He first admits that state segregation statutes do not violate the Fourteenth Amendment. This admission, presumably, should suffice to remove the Fourteenth Amendment from consideration in this case, at least so far as the Solicitor General is concerned. However, he is compelled to admit, because of the numerous decisions of this Court to that effect, that if the Separate Coach Law of the State of Arkansas was enacted because of an important occasion for the exercise of the police power of Arkansas, then an interstate carrier would not be exempt therefrom. Then, in an effort to support his

contention that the Separate Coach Law of the State of Arkansas is unconstitutional, under the commerce clause, if applicable to interstate passengers, he reverses his field, and says that the Thirteenth, Fourteenth and Fifteenth Amendments must be considered; and, while admitting that they fall short of a prohibition against segregation, he contends that the "policy" enunciated in those Amendments against racial discrimination, must control the Court in its consideration and determination of the question of whether or not such statutes, if applicable to interstate passengers, are violative of the commerce clause.

In the first place, it might be well to observe that, as hereinabove pointed out, this Court has long since held (*Plessy v. Ferguson*, supra) that such statutes do not discriminate against either race.

In support of this novel, and, we submit, fallacious, reasoning, the Solicitor General cites the cases of *Keifer & Keifer v. Reconstruction Finance Corporation*, 306 U. S. 381, and *United States v. Hutcheson*, 61 Sup. Ct., Advance Sheet No. 8, page 463. We do not believe either of these decisions to be authority for such a contention.

In the first of those cases, the question before the Court was whether or not the Regional Agricultural Credit Corporation, created by the Reconstruction Finance Corporation, pursuant to statutory authority granted to it by the Congress, was

immune from suit. The Court, after pointing out that the statute creating the Reconstruction Finance Corporation made it amenable to suit, and that it was the policy of the Congress, in creating such corporations, to make them amenable to suit, as evidenced by some forty statutes creating such corporations, held that the provision of the statute which created the Reconstruction Finance Corporation, making it amenable to suit, extended to the Regional Agricultural Credit Corporation.

The question before the Court in the latter case was whether or not certain conventional, peaceful activities of a labor union in a labor dispute were in violation of the Sherman Law of 1890, as amended. The Court, in reaching the conclusion that such activities were not in violation of the Sherman Law, which is a statute dealing with labor disputes, that belongs to the body of the criminal law, held that the Clayton Act of 1914 and the Norris-LaGuardia Act of 1932, also dealing with the subject of labor disputes, but which belonged to the body of the equity law, should be considered, and found that the effect of the latter statutes was to remove the sting of criminality from certain activities of unions in labor disputes which had prior thereto been made a violation of law by the Sherman Law.

As we read the opinions in these cases, they, in effect, amount to nothing more nor less than applications of the familiar principle of statutory construction that statutes dealing with the same general subject must be considered in pari materia in arriv-

ing at the intention of the law-making body. Certainly, it cannot be said that they support a contentention that, in considering whether or not a particular statute is in violation of the commerce clause of the Constitution, the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution, which the statute admittedly does not controvert, should be considered, and that the statute should be held in violation of the commerce clause of the Constitution because of the so-called "policy" enunciated by those Amendments.

THE APPLICABILITY OF STATE SEGREGATION STATUTES TO INTERSTATE COMMERCE, AND THEIR CONSTITUTIONALITY, IF SO APPLICABLE.

It seems, as stated by the Solicitor General in his memorandum for the United States, and as stated in the brief for the Interstate Commerce Commission, that this Court has never decided the question of the applicability of state segregation statutes to interstate passengers, nor the question of the constitutionality of such statutes, if so applicable.

It is true, as stated in the memorandum of the Solicitor General, that the courts of six states have held, directly and indirectly, that such statutes are limited in their application to intrastate passengers, and that in those instances where such holdings of the state courts have been before this Court for review, this Court has, upon familiar principles, ac-

cepted the construction placed upon the state statutes by the state courts. However, as the Solicitor General said, "these decisions, it is true, do not represent an independent ruling on statutory construction; ordinarily the opinion proceeds under the compulsion of an assumed constitutional prohibition."

This assumed constitutional prohibition seems to have been rested mainly on the decision of this Court in *Hall v. DeCuir*, supra, which held invalid, as an unauthorized regulation of interstate commerce, an 1869 statute of the State of Louisiana which expressly prohibited common carriers in the State of Louisiana from segregating passengers on account of race or color.

However, the Supreme Courts of the States of Mississippi and Tennessee, in well reasoned opinions, where *Hall v. DeCuir*, supra, is considered and distinguished, have held that their state segregation statutes, similar to the Separate Coach Law of the State of Arkansas, are applicable to interstate, as well as intrastate, passengers, and that, as so applicable, they are constitutional. So cogent are the reasons given by the Supreme Courts of those two states in support of their conclusions, that we here quote in extenso from their opinions.

In *Alabama & Vicksburg R. R. Co. v. Morris*, 103 Miss. 511, 60 So. 11, in holding that the segregation statute of the State of Mississippi applied to interstate passengers, as well as intrastate passen-

gers, and that as so applied it was constitutional, the Court spoke as follows:

> "In *Hall v. De Cuir*, 95 U. S. 485, 24 L. Ed. 547, the court decided precisely the same question as was subsequently before the court in *Chiles v. Chesapeake & Ohio Ry. Co., supra.* There was this difference, however, in the facts of the two cases: The interstate carrier in the De Cuir case was a steamboat engaged in traffic on the waters of the Mississippi river, and was licensed to do a coasting trade, and registered under the laws of Congress of the United States. A negro interstate passenger demanded her rights, guaranteed by the laws of Louisiana, which reserved to negro passengers and to white passengers the privilege of being assigned to the same cabins on the boat. In that case the negro passenger declined to occupy cabins assigned to negroes. Preferring to associate with white folk, she asked to be put in the cabins occupied by persons of that race. There are, of course, persons who prefer to mingle with persons of a different race, even against the will of that race, but, happily, this class is negligible in number; but we find two of the class figuring in the decisions of the state and national courts.
>
> "In *Stone v. Yazoo, etc. R. R. Co.*, 62 Miss. 635 (52 Am. Rep. 193), commenting on the De Cuir case, CAMPBELL, C. J., made the following

observations: 'The statute of Louisiana requiring common carriers of passengers to give all persons traveling in that state, upon the public conveyance employed in such business, equal rights and privileges in all parts of the coyveyance, without discrimination or distinction on account of race or color, was held to be a regulation of commerce and void, even within the state, so far as it affected vessels plying the waters of the Mississippi river between different states. *The reason was the steamboat was enrolled and licensed under the laws of the United States and engaged as a regular packet between different states upon the navigable waters of the United States. The vessel was, in a sense, an institution of the United States, deriving its right to pursue its business from the United States and navigating the national highway common to all and not the property of private persons, or deriving its existence from a state. As Congress had regulated the business by providing for licensing vessels and leaving the license free and untrammeled as to the accommodations of passengers, and by the common law it pertains to the business of a common carrier to make reasonable and suitable regulations as regards passengers, it was held that Louisiana had no right to add a requirement not imposed by Congress, which in regulating the matter had left the common law in force as to this.*'

"It would serve no good purpose to review the several cases decided by the Supreme Court

of the United States, and cited in support of the contention of appellant, as we believe no case can be found decisive of the precise question raised in the instant case. The cases most nearly approaching the subject have been analyzed, and, in our opinion, none of them have pronounced a state statute, similar to our own, an invasion of the national authority to regulate and control commerce between the states, should it be interpreted to mean that the statute applies to interstate travelers aboard trains forming a part of a chain of carriers engaged in the business of transporting passengers taken up within the state for carriage to a point without the state. This is exactly the question involved in this case, and such a passenger is claiming damages because negro passengers were assigned to the same Pullman car to which she was assigned, and which she was compelled to occupy, or retire to one of the day coaches attached to the train; there being no sleeping car other than the one occupied by the negroes.

"We find ourselves unable to reach the conclusion that the legislature intended to limit the application of the statute to that portion of the train given over to the accommodation of intrastate passengers. To so hold would be to disregard the reason which underlies this legislation.

"The legislature, in the exercise of its power to police the highways of commerce running

through the state, enacted the statute in question to promote the peace, comfort, and general welfare of the public.

"The statute was not enacted with any idea of discriminating against the members of either race; nor was it prompted by prejudice or passion, but with the knowledge that the enforced intermingling of the races would be distasteful to both races, would inevitably result in discomfort to both, and provoke and encourage conflicts endangering the peace and quiet of the commonwealth.

"True the application of the statute to interstate trains necessarily imposes an additional expense upon the carrier. This carrier would be required to provide another Pullman, or to divide the one used into separate compartments; but it has been decided time and again that merely an additional expenditure of money will not render a statute so requiring susceptible to criticism.

"This statute has been upon our books for many years, and has caused no complaint or criticism from the inhabitants of the state. The two races here accept the law as a wise and necessary exercise of the police power of the state for the protection of members of both races. No greater punishment could be inflicted upon the average negro traveler than being

obliged to sit in the coach set apart for whites, and our colored fellow citizens would be the first to oppose a repeal of the statute.

"A riot upon an interstate train growing out of the refusal of common carriers to recognize a situation known to every Mississippian —black and white—would endanger the lives and disturb the peace of all persons passengers on the train, intrastate and interstate; and we therefore decline to limit the application of the statute to intrastate commerce. Possessing the knowledge of local conditions common to all residents of our section, we confess some surprise that there was no sequel to the event described by the record.

"The ultimate settlement of the question rests with the Supreme Court of the United States; and, until that great court decides against the validity of the statute as construed by us, we feel impelled to adhere to our belief that the law is not only beyond criticism from a constitutional standpoint, but is also a reasonable and wise exercise of the police power of the state.

"One more observation: If we should hold that the statute is inapplicable to interstate travelers, it seems to us that necessarily it must be condemned altogether, as the theory upon which its wisdom and justice rests will thus be

declared fanciful and without foundation in fact. If the peculiar conditions existing here demanded this legislation to conserve the peace of the state, and our lawmakers have so decided, the mere fact that the passenger is going out of the state, coming into the state from without, or traveling across the state, does not alter the complexion of affairs, nor render the danger less, should a negro or white man be required, against his will, to occupy a car with passengers of another race.

"Each section of our common country has its own problems, and the laws of one state may not be necessary in another state; and that a law found to be necessary in our state should be assailed by a corporation created by the state may account for the amount of the verdict in this case. The statute in question, rather than burdening the carrier, is an aid to the peaceful operation of its business; and we have no doubt that its overthrow would create intolerable conditions, from which the railway company would be the first and greatest sufferer." (Emphasis supplied)

In the case of *Smith v. State*, 100 Tenn. 494, 46 S. W. 566, the Supreme Court of Tennessee, in reaching the same conclusions as to the segregation statute of that state, as those reached by the Mississippi Court in the case just quoted from, said:

"It is admitted that the Act, so far as it operates to regulate commerce within the State, is valid, but it is urged that it is invalid as applied to the case of those passengers taken into the car without the State to be brought within or transported through it, as was the case in this instance, and it is urged that the question is so decided by the Supreme Court of the United States in the case of *Hall v. DeCuir*, 95 U. S. 485.

"If the contention of plaintiff in error as to the effect of this decision was correct, we would hold that decision conclusive and reverse the judgment, for we not only recognize the right of that Court to determine that question, but we regard its adjudications as always correct within its province, until reversed or changed by itself, and accord to them that unhesitating respect which is due the Supreme Court of the United States as our own highest Court for the settlement, and rightful settlement, of all questions which our Federal Constitution and laws submit to its judgment.

* * * * * *

"But we are of the opinion that the question here involved was not decided in the case referred to, and upon the aspect here presented, was not even considered.

"The question there was this: Under the Constitution of Louisiana all persons were given

equal rights and privileges upon any conveyance of a public character, and the Legislature of that State provided, substantially, that all persons should be carried together in public conveyances. A carrier engaged in interstate commerce under a regulation adopted for that purpose by itself, provided separate accommodations for white and colored passengers through that State and others adjacent. A colored passenger applied for transportation from New Orleans to Hermitage, both points within the State of Louisiana, and being refused accommodations, on account of her color, in the cabin specially set apart for white persons, brought suit in the Eighth District Court for the Parish of New Orleans, under the Louisiana Act, to recover damages for her mental and physical sufferings. She obtained a judgment for $1,000. Defendant appealed to the Supreme Court of the State, and the judgment was affirmed. The case was carried to the Supreme Court of the United States, under Section 709 of the Revised Statutes. *That Court held that the law as construed by the State Court (which construction was conclusive upon Supreme Court of the United States) gave to all persons traveling in Louisiana upon public conveyances, though engaged in interstate commerce, equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color, and deal with it, upon that aspect alone, as an effort to regulate interstate commerce by the State, and not as a police measure,*

which it was not, and in which aspect, therefore, was not considered. It was held to be a regulation of interstate commerce, and to be void, because such power was vested alone in Congress to be exercised, and whether it had done so or not, the State could not do it by such a law.

* * * * * *

"A requirement that all persons who travel shall travel together, is not in any sense a police regulation. It is easy to perceive how it might conduce to the comfort, health, or safety of persons traveling to be separated, but no reason of this kind can be found, nor any other of a police nature, for requiring that all should be crowded or mixed together. And, presumably, therefore, as it did not arise, no such question was made. It certainly was not considered or decided in that case.

* * * * * *

"As already said, it was not presented as a police regulation. It was not such, but was a regulation, pure and simple, of interstate commerce. It was not an Act passed in the exercise of a police power. It was based upon no such power, nor did it purport to be. The decision that it was, hence, not a valid law, was a matter of course.

"It remains only to consider whether it is a proper and reasonable exercise of the police power of the State, for, as was said in *Plessy v. Ferguson*, 'every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class.'

* * * * * *

"It will be seen that the Act provides for separate accommodations, but for equal accommodations. It imposes no burden on either race, and gives to each the same privileges. Even in the matter of carrying nurses of another race, it gives to the colored passenger the same right to take a white nurse into the car for colored people that it does to the white passenger to take a colored nurse into that provided for white people. It is entitled, if that were material, 'An Act to promote the comfort of passengers.' It may operate for this purpose or to promote the safety of one or both, or to further the ends of good order. If it be true, as is sometimes said, that race prejudices exist here that make it uncomfortable or unsafe or promotive of disorder to mix the races in public conveyances, then both safety and good order are promoted as well as comfort, in their separation. The State is to judge of the necessity for such a regulation. Whether either or both should be uncomfortable, unsafe, or liable to the injury or annoyance of disorder by such inter-

mixture in travel, is not the question. The question is whether it in fact is so, or whether the State Legislature reasonably deemed it so and provided against the consequences. It is in these respects, therefore, entirely reasonable.

"No good reason can be perceived why such legislation is objectionable, or why it might not even be extended. If California, or any of the States of the West, should take a like view as to intermixture of their Chinese population with that of native or white people in public conveyances, it seems clear that, for the same reasons, they might enact the same laws, and, indeed, yet others for the separation of other races who might be hostile or prejudiced toward each other. The argument that it imposes unnecessary burdens on the carrier, to which so much weight was given in the DeCuir case, is not relevant, if it be a police regulation of a reasonable and proper character. The same argument was made, and on this ground repudiated, in the case of *R. Co. v. N. Y.*, 165 U. S., p. 628, and *Hennington v. Georgia*, 163 U. S., 299.

"We conclude, therefore, that the law is a reasonable police regulation, and applies to both intra and inter-state travel; that it is not invalid for any reason, or obnoxious to the Federal Constitution; that the question is an open one, under the decision of the Supreme Court of the United States, and that there is no reversible error in the judgment of the Court below." (Emphasis supplied.)

To like effect are the cases of *Southern Railway Company v. Norton*, 112 Miss. 302, 73 So. 1, and *Southern Railway Company v. Primrose*, 73 So. 2.

It is interesting to note that both *Alabama & Vicksburg R. R. Co. v. Morris*, supra, and *Smith v. State*, supra, were appealed to this Court by the carriers, but that the appeals were dismissed on their motions. 234 U. S. 766; 21 Sup. Ct. 917, 45 L. Ed. 1256. Of course, the reason for this action of the carriers after the cases were appealed to this Court is not known, but presumably they were satisfied with the correctness of the decisions of the State Supreme Courts.

We respectfully submit that these decisions are correct, that the reasoning on which they are based is sound, and that, should this Honorable Court decide that the question of the applicability of the Separate Coach Law of the State of Arkansas to interstate passengers, and the question of its constitutionality, if so applicable, are before the Court for consideration and determination in this cause, then the views of those courts on these questions should be adopted.

This Court has repeatedly upheld the right of the states, under the police power, to legislate for the health, welfare, safety, peace and comfort of the people within its borders, even though such legislation incidentally affected, or even burdened or impeded, interstate commerce.

Chicago, Rock Island & Pacific R. Co. v. Arkansas, 219 U. S. 453;

St. L. I. M. & S. R. Co. v. Arkansas, 240 U. S. 518;

South Carolina Highway Department v. Barnwell Bros., 303 U. S. 177;

Arkansas Gas Co. v. Department, 304 U. S. 61;

Welch Co. v. New Hampshire, 306 U. S. 79;

Milk Board v. Eisenberg Co., 306 U. S. 346;

Clason v. Indiana, 306 U. S. 439;

Maurer v. Hamilton, 309 U. S. 598.

Peculiarly pertinent, we think, to the instant situation is the following statement from the opinion of Mr. Justice Stone in the *Barnwell Bros.* case, supra:

> "While the constitutional grant to Congress of power to regulate interstate commerce has been held to operate of its own force to curtail state power in some measure, it did not forestall all state action affecting interstate commerce. Ever since *Willson v. Black Bird Creek Marsh Co.*, 2 Pet. 245, and *Cooley v. Board of Port Wardens*, 12 How. 299, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully

dealt with by Congress. Notwithstanding the commerce clause, such regulation in the absence of Congressional action has for the most part been left to the states by the decisions of this Court, subject to the other applicable constitutional restraints."

Undoubtedly, the question of the segregation of the races "touches a sensitive area of social policy." We again submit that such statutes were enacted for the purpose of promoting the welfare, comfort, peace and safety of the people of both races. We believe that it is a matter of common knowledge, which this Court judicially knows, that in those States and Commonwealths which are parties to this brief, where large numbers of both races reside, such statutes do, in truth and in fact, promote the welfare, comfort, peace and safety of the people of both races.

The appellant lays great store by the dicta of this court in the case of *McCabe v. Atchison, T. & S. F. R. Co.*, 235 U. S. 151. However, it should be noted that all of the statements in the opinion of the Court in that case on which appellant relies are dicta, and that the only question decided in that case was one of equity procedure and jurisprudence.

CONCLUSION

We respectfully submit that the question of the applicability of the Separate Coach Law of the State of Arkansas to interstate passengers, and the question of its constitutionality, if so applicable, are not properly before the Court for consideration and determination in this cause. Further, we respectfully submit that since this cause can be disposed of without either "a tentative decision" on the construction of the statute, or "a premature constitutional adjudication;" and, since these questions touch " a sensitive area of social policy," this Court, "exercising a wise discretion," and "because of scrupulous regard for the rightful independence of the state governments" in the reasonable exercise of their police power in dealing with this highly important matter, should restrain its authority and stay its hands.

Finally, we respectfully submit that, should this Court find that these questions should be considered and determined in this cause, then the Separate

Coach Law of the State of Arkansas is applicable to interstate passengers, as well as intrastate passengers, and, as so applicable, is constitutional.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 577.—October Term, 1940.

Arthur W. Mitchell, Appellant, *vs.* The United States of America, Interstate Commerce Commission, Frank O. Lowden, et al. } Appeal from the District Court of the United States for the Northern District of Illinois.

[April 28, 1941.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

Appellant, Arthur W. Mitchell, filed a complaint with the Interstate Commerce Commission alleging an unjust discrimination in the furnishing of accommodations to colored passengers on the line of the Chicago, Rock Island & Pacific Railway Company from Chicago to Hot Springs, Arkansas, in violation of the Interstate Commerce Act. The Commission dismissed the complaint (229 I. C. C. 703) and appellant brought this suit to set aside the Commission's order. Upon a hearing before three judges, the District Court found the facts as stated in the Commission's findings, and held that the latter were supported by substantial evidence and that the Commission's order was supported by its findings. The court then ruled that it was without jurisdiction, and its dismissal of the complaint was stated to be upon that ground. The case comes here on direct appeal. 28 U. S. C. 47a.

The following facts were found by the Commission: Appellant, a Negro resident of Chicago, and a member of the House of Representatives of the United States, left Chicago for Hot Springs on the evening of April 20, 1937, over the lines of the Illinois Central Railroad Company to Memphis, Tennessee, and the Rock Island beyond, traveling on a round-trip ticket he had purchased at three cents per mile. He had requested a bedroom on the Chicago-Hot Springs Pullman sleeping car but none being available he was provided with a compartment as far as Memphis in the sleeper destined to New Orleans. Just before the train reached Memphis, on the morning after leaving Chicago, he had a Pullman porter transfer him to the Chicago-Hot Springs sleeper on the same train.

Space was there available and the porter assigned him a particular seat in that car for which he was to pay the established fare of ninety cents. Shortly after leaving Memphis and crossing the Mississippi River into Arkansas, the train conductor took up the Memphis-Hot Springs portion of his ticket but refused to accept payment for the Pullman seat from Memphis and, in accordance with custom, compelled him over his protest and finally under threat of arrest to move into the car provided for colored passengers. This was in purported compliance with an Arkansas statute requiring segregation of colored from white persons by the use of cars or partitioned sections providing "equal, but separate and sufficient accommodations" for both races. Later the conductor returned the portion of the ticket he had taken up and advised appellant that he could get a refund on the basis of the coach fare of two cents per mile from Memphis. That refund was not claimed from defendants and was not sought before the Commission, but it was found that the carriers stood ready to make it upon application. Appellant has an action at law pending against defendants in Cook County, Illinois, for damages incident to his transfer.

The Commission further found that the Pullman car contained ten sections of berths and two compartment drawing rooms; that the use of one of the drawing rooms would have amounted to segregation under the state law and ordinarily such combinations are available to colored passengers upon demand, the ninety cent fare being applicable. Occasionally they are used by colored passengers but in this instance both drawing rooms were already occupied by white passengers. The Pullman car was of modern design and had all the usual facilities and conveniences found in standard sleeping cars. It was air-conditioned, had hot and cold running water and separate flushable toilets for men and women. It was in excellent condition throughout. First-class white passengers had, in addition to the Pullman sleeper, the exclusive use of the train's only dining-car and only observation-parlor car, the latter having somewhat the same accommodations for day use as the Pullman car.

The coach for colored passengers, though of standard size and steel construction, was "an old combination affair", not air-conditioned, divided by partitions into three main parts, one for

colored smokers, one for white smokers and one in the center for colored men and women, known as the women's section, in which appellant sat. There was a toilet in each section but only the one in the women's section was equipped for flushing and it was for the exclusive use of colored women. The car was without wash basins, soap, towels or running water, except in the women's section. The Commission stated that, according to appellant, the car was "filthy and foul smelling", but that the testimony of defendants' witnesses was to the contrary.

The Commission found that in July, 1937, about three months after complainant's journey above mentioned, the old combination coach was replaced by a modern, all-steel, air-conditioned coach, which was divided by a partition into two sections, one for colored and the other for white passengers, and had comfortable seats. In each section there are wash basins, running hot and cold water, and separate flush toilets for men and women". This coach, the Commission said, was "as fully desirable in all its appointments as the coach used entirely by white passengers traveling at second-class fares".

The Commission also found that the demand of colored passengers for Pullman accommodations over the route in question was shown to have been negligible for many years; that "only about one negro to twenty white passengers rides this train from and to points on the line between Memphis and Hot Springs", and there is hardly ever a demand from a colored passenger for Pullman accommodations. The conductor estimated that this demand did not amount to one per year. What demand there may have been at ticket offices did not appear.

The Commission's conclusion was thus stated: "The present coach properly takes care of colored second-class passengers, and the drawing rooms and compartments in the sleeper provide proper Pullman accommodations for colored first-class passengers, but there are no dining-car nor observation-parlor car accommodations for the latter, and they cannot lawfully range through the train".

The Commission, though treating the enforcement of the state law as a matter for state authorities, thought that in deciding the case on the facts presented it must recognize that the state law required the defendants to segregate colored passengers; that in these circumstances the present colored-passenger coach and the Pullman

drawing rooms met the requirements of the Act; and that as there was comparatively little colored traffic and no indication that there was likely to be such demand for dining-car and observation-parlor car accommodations by colored passengers as to warrant the running of any extra cars or the construction of partitions, the discrimination and prejudice was "plainly not unjust or undue". The Commission observed that it was only differences in treatment of the latter character that were "unlawful and within the power of this Commission to condemn, remove and prevent".

From the dismissal of the complaint, five Commissioners dissented.

The United States as a party to this suit to set aside the Commissioner's order, and one of the appellees, does not support the judgment of the court below and has filed a memorandum stating its reasons. The Government concludes that the Commission erroneously supposed that the Arkansas Separate Coach Law applied to an interstate passenger and erroneously determined that the small number of colored passengers asking for first-class accommodations justified an occasional discrimination against them because of their race.

The other appellees—the Interstate Commerce Commission and the carriers—appear in support of the judgment.

First.—The Commission challenges the standing of appellant to bring this suit. We find the objection untenable. This question does not touch the merits of the suit, but merely the authority of the District Court to entertain it. The fact that the Commission's order was one of dismissal of appellant's complaint did not foreclose the right of review. Appellant was an aggrieved party and the negative form of the order is not controlling. *Rochester Telephone Corporation* v. *United States*, 307 U. S. 125, 143.

Nor is it determinative that it does not appear that appellant intends to make a similar railroad journey. He is an American citizen free to travel, and he is entitled to go by this particular route whenever he chooses to take it and in that event to have facilities for his journey without any discrimination against him which the Interstate Commerce Act forbids. He presents the question whether the Act does forbid the conduct of which he complains.

The question of appellant's right to seek review of the Commission's order thus involves the primary question of administrative authority, that is, whether appellant took an appropriate course in

seeking a ruling of the Commission. The established function of the Commission gives the answer. The determination whether a discrimination by an interstate carrier is unjust and unlawful necessitates an inquiry into particular facts and the practice of the carrier in a particular relation, and this underlying inquiry is precisely that which the Commission is authorized to make. As to the duty to seek a determination by the Commission in such a case, we do not see that a passenger would be in any better situation than a shipper. *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Robinson* v. *Baltimore & Ohio R. R. Co.*, 222 U. S. 506; *Mitchell Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 247; *Morrisdale Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 304; *General American Tank Car Co.* v. *El Dorado Terminal Co.*, 308 U. S. 422.

The District Court had jurisdiction to review the action of the Commission and the question on that review was whether that action was in accordance with the applicable law.

Second.—The case was submitted to the District Court upon the evidence taken before the Commission. The undisputed facts showed conclusively that, having paid a first-class fare for the entire journey from Chicago to Hot Springs, and having offered to pay the proper charge for a seat which was available in the Pullman car for the trip from Memphis to Hot Springs, he was compelled, in accordance with custom, to leave that car and to ride in a second-class car and was thus denied the standard conveniences and privileges afforded to first-class passengers. This was manifestly a discrimination against him in the course of his interstate journey and admittedly that discrimination was based solely upon the fact that he was a Negro. The question whether this was a discrimination forbidden by the Interstate Commerce Act is not a question of segregation[1] but one of equality of treatment. The denial to appellant of equality of accommodations because of his race would be an invasion of a fundamental individual right which is guaranteed against state action by the Fourteenth Amendment (*McCabe* v. *Atchison, T. & S. F. Rwy. Co.*, 235 U. S. 151, 160-162; *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337, 344, 345) and in view of the nature of the right and of

[1] In this view, we have no occasion to consider the questions discussed by the Attorneys General of several States in their briefs as amici curiae.

our constitutional policy it cannot be maintained that the discrimination as it was alleged was not essentially unjust. In that aspect it could not be deemed to lie outside the purview of the sweeping prohibitions of the Interstate Commerce Act.

We have repeatedly said that it is apparent from the legislative history of the Act that not only was the evil of discrimination the principal thing aimed at, but that there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach. *The Shreveport Case*, 234 U. S. 342, 356; *Louisville & Nashville R. Co.* v. *United States*, 282 U. S. 749, 750; *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, 512, 513. Paragraph 1 of Section 3 of the Act says explicitly that it shall be unlawful for any common carrier subject to the Act "to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever". 49 U. S. C. 3. From the inception of its administration the Interstate Commerce Commission has recognized the applicability of this provision to discrimination against colored passengers because of their race and the duty of carriers to provide equality of treatment with respect to transportation facilities; that is, that colored persons who buy first-class tickets must be furnished with accommodations equal in comforts and conveniences to those afforded to first-class white passengers. See *Council* v. *Western & Atlantic R. R. Co.*, 1 I. C. C. 339; *Heard* v. *Georgia R. R. Co.*, 1 I. C. C. 428; *Heard* v. *Georgia R. R. Co.*, 3 I. C. C. 111; *Edwards* v. *Nashville, C. & St. L. Rwy. Co.*, 12 I. C. C. 247; *Cozart* v. *Southern Rwy. Co.*, 16 I. C. C. 226; *Gaines* v. *Seaboard Air Line Rwy. Co.*, 16 I. C. C. 471; *Crosby* v. *St. Louis-San Francisco Rwy. Co.*, 112 U. S. 239.[2]

I.C.C.

Third.—We find no sound reason for the failure to apply this principle by holding the discrimination from which the appellant suffered to be unlawful and by forbidding it in the future.

[2] In Edwards v. Nashville, C. & St. L. Rwy. Co., 12 I. C. C. 247, 249, the principle was thus stated: "If a railroad provides certain facilities and accommodations for first-class passengers of the white race, it is commanded by the law that like accommodations shall be provided for colored passengers of the same class. The principle that must govern is that carriers must serve equally well all passengers, whether white or colored, paying the same fare. Failure to do this is discrimination and subjects the passenger to 'undue and unreasonable prejudice and disadvantage' ".

That there was but a single incident was not a justification of the treatment of the appellant. Moreover, the Commission thought it plain that "the incident was mentioned as representative of an alleged practice that was expected to continue". And the Commission found that the ejection of appellant from the Pullman car and the requirement that he should continue his journey in a second-class car was "in accordance with custom", that is, as we understand it, according to the custom which obtained in similar circumstances.

Nor does the change in the carrier's practice avail. That did not alter the discrimination to which appellant had been subjected, and as to the future the change was not adequate. It appears that since July, 1937, the carrier has put in service a coach for colored passengers which is of equal quality with that used by second-class white passengers. But, as the Government well observes, the question does not end with travel on second-class tickets. It does not appear that colored passengers who have bought first-class tickets for transportation by the carrier are given accomodations which are substantially equal to those afforded to white passengers. The Government puts the matter succinctly: "When a drawing room is available, the carrier practice of allowing colored passengers to use one at Pullman seat rates avoids inequality as between the accommodations specifically assigned to the passenger. But when none is available, as on the trip which occasioned this litigation, the discrimination and inequality of accommodation become self-evident. It is no answer to say that the colored passengers, if sufficiently diligent and forehanded, can make their reservations so far in advance as to be assured of first-class accommodations. So long as white passengers can secure first-class reservations on the day of travel and the colored passengers cannot, the latter are subjected to inequality and discrimination because of their race". And the Commission has recognized that inequality persists with respect to certain other facilities such as dining-car and observation-parlor car accommodations.

We take it that the chief reason for the Commission's action was the "comparatively little colored traffic". But the comparative volume of traffic cannot justify the denial of a fundamental right of equality of treatment, a right specifically safeguarded by the provisions of the Interstate Commerce Act. We thought a

similar argument with respect to volume of traffic to be untenable in the application of the Fourteenth Amendment. We said that it made the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of that right is that it is a personal one. *McCabe* v. *Atchison, Topeka & Santa Fe Rwy. Co., supra.* While the supply of particular facilities may be conditioned upon there being a reasonable demand therefor, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual, we said, who is entitled to the equal protection of the laws,—not merely a group of individuals, or a body of persons according to their numbers. *Id.* See, also *Missouri ex rel. Gaines* v. *Canada,* pp. 350, 351. And the Interstate Commerce Act expressly extends its prohibitions to the subjecting of "any particular person" to unreasonable discriminations.

On the facts here presented, there is no room, as the Government properly says, for administrative or expert judgment with respect to practical difficulties. It is enough that the discrimination shown was palpably unjust and forbidden by the Act.

The decree of the District Court is reversed and the cause is remanded with directions to set aside the order of the Commission and to remand the case to the Commission for further proceedings in conformity with this opinion.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.